01-18-00538-CR

In the
Court of Appeals
For the First District of Texas
At Houston

No. 2167075
In the County Criminal Court at Law No. 6
of Harris County, Texas

RICARDO ROMANO
Appellant
V.
THE STATE OF TEXAS
Appellee

STATE'S MOTION FOR EN BANC RECONSIDERATION

KIM OGG
District Attorney
Harris County, Texas

CORY STOTT
Assistant District Attorney
Harris County, Texas
TBC No. 24076946
Stott_Cory@dao.hctx.net

MICHAEL MITCHELL
Assistant District Attorney
Harris County, Texas

1201 Franklin, Suite 600
Houston, Texas 77002
Tel: (713) 274-5826
Fax: (832) 927-0180

Counsel for Appellee

ORAL ARGUMENT NOT REQUESTED

TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES

STATUTES

RULES

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to TEX. R. APP. P. 39.7, the State waives oral argument.

TO THE HONORABLE COURT OF APPEALS:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On August 24, 2017, the appellant was charged by information with indecent exposure committed on August 23, 2017. (CR. – 7). Following a trial, the court found the appellant guilty of the charged offense on May 18, 2018. (CR. – 61). The court sentenced him the same day to three days in jail. *Id.* The trial court certified the appellant's right to appeal on May 18, 2018; the appellant timely filed notice of appeal on June 12, 2018. (CR. – 54, 64-70).

On October 8, 2019, this Court reversed the judgment of the trial court and rendered a judgment of acquittal. *Romano v. State*, 01-18-00538-CR, 2019 WL 4936040, at *7 (Tex. App.—Houston [1st Dist.] Oct. 8, 2019, no pet. h.). Specifically, this Court found insufficient evidence to prove that the appellant was reckless about the presence of another. *Id*. at *6. Pursuant to TEX. R. APP. P. 49.7, the State respectfully brings this motion for en banc reconsideration, which is timely filed with this Court within fifteen days of this Court's judgment of acquittal.

GROUND FOR RECONSIDERATION

This Court misapplied the standard of review. Specifically, the panel in this case assumed the role of fact-finder rather than viewing the evidence in the light most favorable to the verdict.

ARGUMENT

In the present case, this Court determined that there was insufficient evidence to support a conviction for indecent exposure, specifically noting that the State failed to prove that the appellant was reckless about the presence of another when he exposed his penis in a public park. *Romano*, 2019 WL 4936040 at *6. But the panel in this case misapplied the standard for reviewing the sufficiency of the evidence. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (holding that evidence in sufficiency review is viewed in light most favorable to verdict). Specifically, the panel took on the role of fact-finder reserved in this case for the trial court instead of viewing the evidence in the light most favorable to the trial court's verdict. *See Chambers v. State*, 805 S.W.2d 459, 461 (Tex. Crim. App. 1991) (noting that fact-finder judges credibility of witnesses and may find credible all, some, or none of testimony witnesses give).

The panel of this Court mistakenly characterized the site of this offense, a parking lot off of the "Picnic Loop," as "a remote part of Houston's Memorial Park[,]" but the State's evidence showed that the location was open and visible to

both passing traffic and anyone using the nearby restroom facilities. *Romano*, 2019 WL 4936040 at *1; (State's Ex. 2). The time of the offense was around midday, and the weather was clear; multiple cars, a bicyclist, and a pedestrian passed within view during the time Gardiner's body camera recorded the investigation and arrest. (I R.R. – 47, 59); (State's Ex. 2). Other than the appellant's vehicle, four cars drove along the Picnic Loop and passed the entrance of the lot at 1:56, 4:14, 7:46, and 37:38. *Id*. A vehicle was parked and stationary at the nearby restrooms at 38:49. *Id*. A pedestrian walked by the entrance to the parking lot at 14:57. *Id*. And a passing bicyclist appeared on the loop at 19:02. *Id*.

A person is reckless with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial risk that the circumstances exist or the result will occur. TEX. PENAL CODE § 6.03(c) (West 2017). And "[t]he risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint." *Id*. As this Court has noted, the objective standard of recklessness is viewed through the eyes of the ordinary person standing in the defendant's shoes. *Hefner v. State*, 934 S.W.2d 855, 857 (Tex. App.—Houston [1st Dist.] 1996, pet. ref'd).

In finding that the appellant's act was not reckless, the panel of this Court referenced *Hines* to support the proposition that "[a] person who makes deliberate efforts to go to a remote area and shield himself from public view cannot be said to be acting recklessly." *Romano*, 2019 WL 4936040 at *6 (citing *Hines v. State*, 906 S.W.2d 518, 522 (Tex. Crim. App. 1995)). But *Hines* is inapposite. The appellant in *Hines* "deliberately selected an isolated spot 'deep in the woods,' where his conduct would not be observed by others." *Hines*, 906 S.W.2d at 522. Here, the appellant parked in an open area and shielded his exposed penis only partially by opening his passenger-side door. (State's Ex. 2). The closest wooded area was at least some yards away. *Id*. The appellant disregarded the rustling of leaves nearby, which was caused by Gardiner's horse, so he was aware at the very least that someone might view him from that direction, even if he escaped detection by passing traffic, cyclists, or pedestrians in the picnic area of a Houston public park.

A more fitting case for comparison is *McGee*, in which a store manager saw the appellant masturbating through a three or four inch gap in a dressing-room curtain. *McGee v. State*, 804 S.W.2d 546, 547 (Tex. App.—Houston [14th Dist.] 1991, no pet.). In finding that the evidence supported the appellant's recklessness, the *McGee* court noted that the appellant "offered no suggestion as to the appropriate standard of care required of an ordinary person masturbating in the dressing room of a store open to the general public. Indeed, the issue as stated is

oxymoronic in nature." *Id*. at 548. A similar observation might be made in the present case—it would be a gross deviation from the standard of care that an ordinary person would use to stand outside a car at midday and masturbate anywhere in a public park. *See* TEX. PENAL CODE § 6.03(c) (West 2017). Because the evidence admitted by the State supported the trial court's rational verdict, the judgment of that court should have been affirmed; the State therefore requests en banc reconsideration.

PRAYER FOR RELIEF

It is respectfully submitted that the State's motion for en banc reconsideration be granted.

KIM OGG
District Attorney
Harris County, Texas

/s/ Cory Stott
CORY STOTT
Assistant District Attorney
Harris County, Texas
1201 Franklin, Suite 600
Houston, Texas 77002
Tel: (713) 274-5826
Fax: (832) 927-0180
TBC No. 24076946
Stott_Cory@dao.hctx.net

CERTIFICATE OF SERVICE AND COMPLIANCE

This is to certify that: (a) the word count function of the computer program used to prepare this document reports that it contains 1,431 words; and (b) the undersigned attorney will request that a copy of the foregoing instrument be served by efile.txcourts.gov to:

Josh Schaffer
Appellate Counsel for Appellant
josh@joshschafferlaw.com

Stacey Soule
State Prosecuting Attorney
P.O. Box 13046
Austin, Texas 78711
stacey.soule@spa.texas.gov
TBC No. 24031632

/s/ Cory Stott
CORY STOTT
Assistant District Attorney
Harris County, Texas
1201 Franklin, Suite 600
Houston, Texas 77002
Tel: (713) 274-5826
Fax: (832) 927-0180
TBC No. 24076946
Stott_Cory@dao.hctx.net

Date: October 23, 2019